

STATE OF MICHIGAN
COURT OF APPEALS

LAWRENCE S. KING,

Plaintiff-Appellant,

v

CHRYSLER GROUP LLC,

Defendant-Appellee,

and

CHRYSLER LLC,

Defendant.

UNPUBLISHED

January 19, 2012

No. 301246

Wayne Circuit Court

LC No. 08-112729-CD

Before: GLEICHER, P.J., CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Plaintiff Lawrence S. King worked as one of three wastewater treatment operators at defendant Chrysler's Detroit Axle Plant. King sued Chrysler under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, alleging that he was fired because he reported to the city of Detroit that contaminated water had overflowed from the plant's treatment system into the City's water supply. The circuit court summarily dismissed King's WPA claim, finding that he had not engaged in a protected activity. We affirm the dismissal, although for reasons different than those expressed by the circuit court.

I. FACTS AND PROCEEDINGS

The Detroit Axle Plant uses a great deal of water during its manufacturing process. Wastewater treatment operators oversee chemical treatment of the wastewater designed to rid it of contaminants. Three tanks, each holding 500,000 gallons, collect the treated wastewater. A permit issued by the city of Detroit allows Chrysler to discharge treated wastewater into the City's sewer system. Occasionally, untreated water overflows from Chrysler's water treatment system and reaches Detroit's sewer system. An accidental release of untreated water is known as an unanticipated bypass. Chrysler's wastewater treatment permit requires that Chrysler inform the City "about the details of the discharge" within 24 hours of an unanticipated bypass. The Detroit Sewers and Drains Ordinance, § 56-3-66.1 *et seq.*, provides that failure to comply with a wastewater discharge permit or to "properly notif[y]" the Detroit Water and Sewerage Department (DWSD) of a bypass constitute ordinance violations.

Between 2000 and 2007, three wastewater treatment operators, working overlapping 12 hour shifts, seven days a week, staffed Chrysler's wastewater treatment facility. King worked the third shift. The operators bore responsibility for treating the wastewater and monitoring the levels of water flowing through the system. They typically devoted the last four hours of their shifts to performing preventative maintenance activities, and received overtime pay for this activity. On January 1, 2008, Chrysler eliminated regular overtime for the wastewater treatment operators. The plant manager informed King and the other two operators that they were required to perform daily preventative maintenance activities during their eight hour shifts. King expressed strong disagreement with the reduction in overtime, and informed his supervisor that he would not perform preventive maintenance unless compensated with overtime pay.

On January 29 or 30, 2008, several alarms sounded, alerting King of high water in one of the tanks. A few hours later, King heard another alarm, checked a tank and observed an unanticipated bypass. King notified his supervisor of the event, and requested that the supervisor report the bypass to the DWSD. The supervisor responded that he had never before reported a bypass, but ultimately he or another Chrysler employee made the necessary notification. King called the City on his way home from work and confirmed that someone from Chrysler had already reported the bypass.

On February 5, 2008, King's supervisor "wrote Mr. King up for failure to follow directions" concerning the performance of preventative maintenance. During King's next shift on February 6, 2008, he allegedly observed approximately 35,000 to 40,000 gallons of untreated water flow into the City's sewer system. Several hours elapsed before King placed a call to his supervisor to inform him of the unanticipated bypass. Because it was early in the morning, the supervisor had not yet arrived at the plant and King left a voice message. On his way home from work that morning, King telephoned the DWSD and reported the bypass.

Later that same day, Kevin Austin, a Chrysler environmental engineer, independently reported the bypass to the City. On February 7, 2008, Austin instructed King and the two other wastewater treatment operators that they were not permitted to notify the City in the event of a bypass, because only Austin bore that responsibility. King testified at his deposition that he "disagreed with that 100 percent," and further explained: "I have a permit from the DEQ from the State of Michigan – a certificate, I'm sorry, and my butt's on the line too, not to mention I didn't like the way he was handling it for Chrysler's sake."

In the following days, Austin and others undertook an investigation of the February 6 unanticipated bypass. An analysis of computer data revealed that no alarms had sounded at the time King claimed to have witnessed the bypass. Austin concluded that that no bypass had actually occurred, and that King lied about having seen one. On February 11, 2008, a Chrysler engineer notified the DWSD that, despite the company's notice, a bypass had not occurred on February 6:

Further investigation indicates that there was no bypass at this time and the report of an unanticipated bypass by the operator was in error. In the event of a bypass, a 'high level' audio and visual alarm will activate. . . . There was no 'High Level' alert stored in the alarm history at the time of the reported bypass. The alarm system was tested on February 7, 2008, which verified that the audio and visual alarms were working properly.

To correct this issue the process for reporting a bypass will be altered to require an independent visual confirmation of the bypass by a supervisor. Further, all Waste Water Treatment Operators will receive additional training on the procedure for recognizing and reporting a system bypass.

On the same day that Chrysler reported these findings to the City, King learned that Ralph Hitzelburger, a supervisor, would remain physically present in the wastewater treatment area during the day shift. King explained that he and the two other wastewater treatment operators resented Hitzelburger's presence because "we had been over there basically self-directing ourselves for the past several years."

The next day, February 12, 2008, the first-shift wastewater treatment operator called in sick. Hitzelburger offered King the opportunity to work overtime. King declined, because he "objected to Mr. Hitzelburger being there." At his deposition, King admitted awareness that Hitzelburger had "little or no experience" working with or operating the water treatment system.

After King left the plant, Hitzelburger monitored the system's controls. He noted that one tank was almost full, a second was filling, and that the emergency safety relief pipes between the tanks had frozen shut. When the overflow alarms began to sound, Austin assisted Hitzelburger and discovered that King had logged out of the computer system while leaving it in "manual" mode. Had the system been running in "automatic" mode, it would have automatically diverted water from the full tank to an empty one. In the manual mode, an operator would have to log into the system with a password and manually divert the flow. Hitzelburger had no password, and Austin had forgotten his. Ultimately, Austin and others at the plant were able to avert a bypass. In a subsequent interview with plant personnel and a union representative, King conceded that he "wanted to teach management a lesson" and "left the tanks full on purpose to prove a point so that everyone would realize someone should be assigned to the [wastewater treatment] area 24/7." Chrysler suspended King and ultimately terminated his employment, concluding that he violated Chrysler's standard of conduct prohibiting the intentional interference of operations.

King filed suit against Chrysler, asserting that Chrysler violated the WPA by terminating his employment in retaliation for reporting the bypasses to the City and for voicing opposition to the policy prohibiting him from making future reports. In Count II of his complaint King alleged that his retaliatory termination also violated public policy. Chrysler moved for summary disposition under MCR 2.116(C)(10), contending that King had not engaged in protected activity under the WPA, and that his own misconduct justified his termination. The circuit court granted Chrysler's motion, concluding that King had not engaged in protected activity, reasoning as follows:

[T]he court agrees with Defendant that it is undisputed that Defendant reported the bypasses at issue to the City of Detroit within the time period set forth in the ordinance and discharge permit. Plaintiff may have been about to make a report when he called the City of Detroit to confirm that the second bypass had been reported. However, because the bypass had been reported within 24 hours as required, Plaintiff could not have been making a report of a violation of rule or law. Accordingly, Plaintiff cannot establish that he engaged in protected activity under the Whistleblower Protection Act and is unable to set

forth a prima facie case of a violation. Therefore, Defendant is entitled to summary disposition in its favor.

II. SUMMARY DISPOSITION STANDARD OF REVIEW

King contests the circuit court's summary disposition ruling, which we review de novo. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A court may grant summary disposition under MCR 2.116(C)(10) if no genuine issue exists regarding any material fact, and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). When a court affords "the benefit of reasonable doubt to the opposing party" and identifies an issue about which "reasonable minds might differ," summary disposition cannot be granted. *West*, 469 Mich at 183. "[I]f reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists." *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

III. THE WHISTLEBLOWERS' PROTECTION ACT: GUIDING PRINCIPLES

"[T]he purpose of the WPA is to protect the public." *Henry v Detroit*, 234 Mich App 405, 413 n 1; 594 NW2d 107 (1999). The act promotes public health and safety by protecting whistleblowers who report violations of the law. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 378–379; 563 NW2d 23 (1997). "Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses." *Id.* at 379. To that end, MCL 15.362 of the WPA prohibits an employer from taking an adverse employment action against an employee who reports "a violation or suspected violation of a law or regulation . . . to a public body."

To establish a prima facie case under the WPA, a plaintiff must demonstrate "that (1) he was engaged in a protected activity as defined by the act, (2) the defendant discharged him, and (3) a causal connection exists between the protected activity and the discharge." *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). When considering WPA claims, we employ the burden-shifting analysis applicable to retaliatory discharge claims under the Civil Rights Act, MCL 37.2101 *et seq.* *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). If the plaintiff successfully demonstrates a prima facie case, "the burden shifts to the defendant to articulate a legitimate business reason for" its adverse employment action. *Id.* If the defendant produces evidence of a legitimate reason for its actions, the plaintiff may submit rebuttal evidence that the defendant's cited reasons are merely a pretext. *Id.*

IV. ANALYSIS

King's unanticipated bypass reports to the City constituted protected activity under the WPA. "A plain reading of the WPA reveals that employees who report violations or suspected violations of the law to a public body are entitled to protection under the act." *Dolan*, 454 Mich at 381.

A person is engaged in 'protected activity' under the [WPA] where the person (1) reports a violation or a suspected violation of a law or regulation to a public body, (2) is about to report such a violation to a public body, or (3) is asked by a public body to participate in an investigation. [*Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002).]

The plain language of the Detroit ordinance governing wastewater bypasses provides that unanticipated bypasses violate the law.¹ Despite that Chrysler's independent report of the bypasses eliminated the City's ability to "take enforcement action" against Chrysler, King

¹ Section 56-3-66.1(c) of the ordinance provides:

Bypass. Bypasses are prohibited unless the bypass does not cause a violation of pretreatment standards or requirements, but only if it is for essential maintenance to ensure efficient operation of the treatment system. These bypasses are not subject to the provisions of subsections (1) and (2) of this section.

(1) *Notice of anticipated bypass.* Industrial users anticipating a bypass shall submit notice to the department at least ten (10) days in advance.

(2) *Notice of unanticipated bypass.* An industrial user shall submit oral notice of an unanticipated bypass that exceeds applicable pretreatment standards within twenty-four (24) hours from the time the industrial user becomes, or should have become, aware of the bypass. . . .

(3) *Prohibition of bypass and enforcement.* Bypass is prohibited, and the department may take enforcement action against a user for a bypass, unless:

a. The bypass was unavoidable to prevent loss of life, personal injury, or severe property damage.

b. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated waste, or maintenance during normal periods of equipment downtime . . . ; and

c. The industrial user properly notified the Department as described in subsection (c)(2) of this section.

nevertheless reported a suspected violation of the law. Thus, the circuit court erred by granting summary disposition on this ground.²

Chrysler alternatively argues that King failed to establish a causal connection between his termination and the protected activity. We assume without deciding that circumstantial evidence of record supported a reasonable inference that King's bypass reports constituted at least a motivating factor in Chrysler's decision to fire him. However, satisfying the requirements of a prima facie case under the WPA is but the first step in proving a case built on circumstantial proof. Once Chrysler articulated a non-discriminatory reason for firing King, the burden shifted to King to put forth evidence that the ostensibly legitimate reasons for his discharge were not true reasons, but mere pretexts for discrimination.

A plaintiff can establish pretext with substantiating evidence that the employer's proffered reasons for the adverse employment action (1) "had no basis in fact," (2) "were not the actual factors motivating the decision," or (3) were "insufficient to justify the decision." *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Chrysler produced abundant evidence that King knew his actions on February 12, 2008 would likely disrupt operations at the wastewater treatment facility. Specifically, King intentionally left the wastewater tanks full and knew by logging out of the computer and leaving it in manual mode, Hitzelburger would be unable to resolve any bypasses without assistance. King admitted his intent to demonstrate management's flawed decision-making during the previous weeks. Indisputably, the business reasons identified for King's termination qualify as legitimate. Our review of the record leads us to conclude that King has presented no evidence from which a fact finder could reasonably conclude that defendants' articulated reasons for his termination constituted pretexts. On this basis, we affirm the circuit court's order granting summary disposition of King's WPA claim.

Lastly, King argues that the circuit court erred by summarily dismissing his allegation that his employment discharge violated public policy. The WPA provides the exclusive remedy for retaliatory discharge claims arising from reporting a legal violation, and consequently preempts common-law public policy claims arising from the same activity. *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 70, 78-79; 503 NW2d 645 (1993), overruled in part on other grounds *Brown v Mayor of Detroit*, 478 Mich 589, 595 n 2; 734 NW2d 514 (2007). Because King has

² We recognize that Chrysler challenges whether King's second report was made in good faith. Viewed in the light most favorable to King, however, the evidence supports that a bypass occurred.

failed to allege that his discharge was motivated by any activity separate and distinct from the actions underlying his whistleblowers' claim, the circuit court did not err in summarily dismissing his public policy averment.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Mark J. Cavanagh

/s/ Peter D. O'Connell